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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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KRISTEN S. BROWN,  
*Complainant,*

v.

BARTHOLOMEW COUNTY SHERIFF'S OFFICE  
*Respondent.*

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Formal Complaint No.  
18-FC-79

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to the formal complaint alleging that the Bartholomew County Sheriff's Office ("BCSO") violated the Access to Public Records Act<sup>1</sup> ("APRA"). The BCSO filed a response to the complaint with this Office through attorney Jeffrey L. Beck. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

to the formal complaint received by the Office of the Public Access Counselor on May 16, 2018.

### **BACKGROUND**

Kristen S. Brown (“Complainant”) contends that the Bartholomew County Sheriff’s Office (“BCSO”) violated the Access to Public Records Act by improperly denying her public records request.

On April 8, 2018, Brown submitted a public records request to the BCSO for the following records:

Copies of all emails sent from/to Matt Myers to/from any number of BCSO employees and City of Columbus’ employees on April 5 and 6, 2018 regarding parking on the City’s undeveloped property east of the jail.

Copies of all emails sent from/to Chris Lane to/from any number of BCSO employees and City of Columbus’ employees on April 5 and 6, 2018 regarding parking on the City’s undeveloped property east of the jail.

On May 15, 2018, the BCSO denied Brown’s request. The BCSO stated that it had reviewed all the emails responsive to Brown’s request but asserted that all the emails “represent intra-agency advisory communications for the purpose of decision making” and excluded them from public access pursuant to Indiana Code section 5-14-3-4(b)(6).

As a result, Brown filed a formal complaint with this Office alleging an improper denial of access under APRA. The BCSO’s response to the complaint mirrors the argument

presented in the agency’s denial letter and also relies on a 1998 case as precedential justification for doing so.

## ANALYSIS

### 1. The Access to Public Records Act (“APRA”)

The Access to Public Records Act (“APRA”) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. The Bartholomew County Sheriff’s Department is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the BCSO public records during regular business hours. Ind. Code § 5-14-3-3(a).

APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

### 2. Deliberative Materials Exception

One of the discretionary exclusions to disclosure is concept of “deliberative materials.” Deliberative materials are defined by statute as:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). By definition, this exception is considerably broad. So broad, in fact, that is it often called the exception that swallows the rule. The rule, of course, being that public records carry a presumption of disclosability as opposed to starting with an exception and working backward toward transparency.

Therefore, the exception, while often meritorious in its application, is a way that public agencies can laconically dismiss a public records request. Surmising that all communication is *de facto* deliberative, agencies rely on this categorization as a lazy way to deny public records requests.

This Office cannot say this is the case in the current instance. However, we have yet to come across a request for a public agency's emails where the entirety of the production of records is properly deemed deliberative.

Because the Access to Public Records Act mandates a presumption of disclosure;<sup>2</sup> and that the Act itself is to be liberally construed in favor of disclosure;<sup>3</sup> and that exceptions to disclosure are to be construed strictly;<sup>4</sup> and that there exists

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<sup>2</sup> Ind. Code § 5-14-3-1

<sup>3</sup> *Id.*

<sup>4</sup> *Lane-El v. Spears*, 13 N.E.3d 859 (Ind. Ct. App. 2014).

a cause of action for applying discretion arbitrarily and capriciously;<sup>5</sup> this Office often recommends public agencies invoke the deliberative material exception judiciously and only when absolutely necessary to preserve the integrity decision-making process of public employees.

Moreover, if a public record contains disclosable and non-disclosable information, APRA requires the public agency separate the material that may be disclosed and make it available for inspection and copying.<sup>6</sup> It bends the limits of reason to suggest every word in *every email* referenced in the request, if disclosed, would create such irreparable harm to internal discourse that certain material could not be separated in the name of transparency and accountability.

If it is true that the agency reviewed each email responsive to the request; and if it is also true that the emails contain material so sensitive that disclosure would irreversibly corrupt the quality of agency decisions, so be it. However, if categorizing the emails as deliberative material—in their entirety—is merely pretense for avoiding the inconvenience of a more thoughtful approach consistent with APRA, a violation of the law has indeed occurred.



Luke H. Britt  
Public Access Counselor

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<sup>5</sup> Ind. Code § 5-14-3-9(g).

<sup>6</sup> Ind. Code § 5-14-3-6